

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
WINSTON R. SCHWYHART)

Appearances:

For Appellant: Winston R. Schwyhart, in pro. per.

For Respondent: Paul J. Petrozzi
Counsel

OPINION

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Winston R. Schwyhart for refund of penalties in the total amount of \$194.00 for the year 1971.

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The issue is whether penalties for failure to file a return and for failure to file a return upon notice and demand were properly imposed.

In 1970 or 1971 appellant Winston R. Schwyhart moved to California from Ohio. He lived for a while in the town of Piedmont, California, but moved to Berkeley in 1972. When he left Piedmont appellant did not leave a forwarding address with the local post office. For a time a friend in Piedmont forwarded appellant's mail to him, but she later lost his new address, and thereafter kept all his mail in a d r a w e r .

Appellant did not file a California personal income tax return for 1971. On April 17, 1973, respondent mailed him a notice demanding that he file that return. The notice was sent to appellant's Piedmont address, and was kept unopened by appellant's friend. Since it received no response to this notice, respondent then estimated appellant's 1971 income, and mailed a copy of a proposed assessment based on this estimate to appellant's Piedmont address on August 20, 1973. The proposed assessment included tax and interest for the year 1971, plus a 25 percent penalty for failure to file a return and an additional 25 percent penalty for failure to file upon notice and demand.

In January 1974 appellant received at his present address a notice of a proposed lien informing him of respondent's assessment. He thereupon contacted respondent's Oakland office. An employee there assertedly told him that in cases similar to his at least half of the penalty was usually forgiven, but that he should pay the entire amount assessed and file a claim for refund of the penalties. Appellant did so in February 1974. Respondent subsequently denied the claim, and this appeal followed.

The penalties in question are imposed by Revenue and Taxation Code section 18681 and former section 18682. Subdivision (a) of section 1868 1 provides in part:

If any taxpayer fails to make and file a return required by this part on or before the due date of the return or the due date as extended by the Franchise Tax Board, then, unless it is shown that the failure is due to reasonable cause and

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not due to willful neglect, 5 percent of the tax shall be added to the tax for each month or fraction thereof elapsing between the due date of the return and the date on which filed, but the total penalty shall not exceed 25 percent of the tax. ...

At the time the demand notice was sent to appellant, former section 18682 provided:

If any taxpayer, upon notice and demand by the Franchise Tax Board, fails or refuses to make and file a return (other than a declaration of estimated tax required under Sections 18414, 18414.5, and 18415) required by this part, the Franchise Tax Board, notwithstanding the provisions of Section 18648, may estimate the net income and compute and levy the amounts of the tax due from any available information. In such case 25 percent of the tax, in addition to the penalty added under Section 18681, shall be added to the tax and shall be due and payable upon notice and demand from the Franchise Tax Board.^{1/}

While former section 18682, unlike section 18681, did not contain an exculpatory clause, respondent's regulations provide that the penalty may be refunded if the taxpayer had reasonable cause for his failure to file a return after demand. (Cal. Admin. Code, tit. 18, reg. 18681-18683(b).) The burden of proving reasonable cause to excuse either penalty is on the taxpayer. (Appeal of Samuel R. and Eleanor H. Walker, Cal. St. Bd. of Equal., March 27, 1973; Appeal of J. H. Hoeppe, Cal. St. Bd. of Equal. , Feb. 16, 1962.) To meet this burden he must demonstrate that his failure to file a return occurred notwithstanding the exercise of ordinary business care and prudence. (Appeal of Herbert Tuchinsky, Cal. St. Bd. of Equal. , July 1, 1970.)

^{1/} This section was repealed by chapter 1065 of the Statutes of 1972, p. 1992, operative January 1, 1974. Its substantive provisions now appear in revised form in section 18683.

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With respect to the penalty for failure to file a return, appellant explains only that he was not aware of the California filing requirements because he had recently moved to this state from Ohio. It is well settled, however, that ignorance of the tax law does not in itself constitute reasonable cause for failure to file a return. (Appeal of David and Hazel Spatz, Cal. St. Bd. of Equal., , May 4, 1970.) Since appellant has not met his burden of proving reasonable cause, respondent's imposition of the penalty must be sustained.

Appellant next argues that he should not be held liable for the additional penalty for failure to file a return upon notice and demand because the demand notice was not forwarded to him. We have determined that, under the facts of this case, this circumstance is not sufficient to excuse the penalty. The standard of ordinary business care requires that a taxpayer take adequate steps to insure that he will receive his mail. (Cf. Appeal of La Salle Hotel Co., Cal. St. Bd. of Equal., Nov. 23, 1966.) The informal arrangements which appellant made with his friend do not meet this standard. We must therefore conclude that appellant has not shown reasonable cause for failure to file upon notice and demand.

Appellant also contends, that he paid the proposed assessment in reliance on the statement of respondent's employee that half **of the penalty would be refunded, and that respondent should therefore** be estopped from refusing his refund claim. We disagree. Estoppel will be invoked against a government agency only in rare and unusual circumstances. (California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal. 2d 865 [3 Cal. Rptr. 675, 350 P. 2d 715].) **Detrimental reliance** must be shown. (Appeal of Frank F. and Vee Z. Elliott, Cal. St. Bd. of Equal., March 27, 1973.) In paying the assessment, appellant merely paid the tax, penalties, and interest which had been properly assessed, against him. He has not shown how his reliance on the employee's advice injured him in any way. There is accordingly no basis for an estoppel.

For the above reasons respondent's action must be sustained.

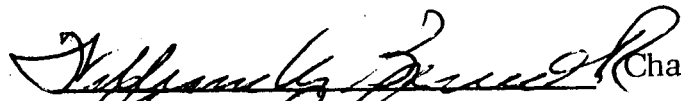


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ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED,, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Winston R. Schwyhart for refund of penalties in the total amount of \$194.00 for the year 1971, be and the same is hereby sustained.

Done at Sacramento, California, this 22ndday of April, 1975, by the State Board of Equalization.

 Chairman
 , Member
 , Member
_____, Member
_____, Member

ATTEST:  , Executive Secretary